95-1710

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, APPELLANT

v.

RAY HAYS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the State of Louisiana's congressional redistricting plan should have been subjected to strict scrutiny.

2. If so, whether that plan satisfies strict scrutiny.

PARTIES TO THE PROCEEDINGS

Plaintiffs are Ray Hays, Edward Adams, Susan Shaw Singleton, Gary Stokely, Patricia Slocum, Richard David, Barbara David, Terry Gillespie, Floyd Gonzalez, Richard Sanders, Parks Sansing and Bobby Williams.

Defendants are the State of Louisiana; M.J. "Mike" Foster, Governor of the State of Louisiana; Randall Ewing, President of the Louisiana State Senate; Hunt Downer, Speaker of the Louisiana House of Representatives; W. Fox McKeithen, Secretary of State of Louisiana; and Jerry Fowler, Commissioner of Elections for the State of Louisiana.

Intervening defendants are the United States, Congressman Cleo Fields, the Louisiana Legislative Black Caucus, Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman and Ralph Wilson.

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OPINIONS BELOW

The third opinion of the three-judge district court (J.S. App. 1-53)[1] is not yet reported. The second opinion of the three-judge district court (J.S. App. 63-98) is reported at 862 F. Supp. 119. The first opinion of the three-judge district court (J.S. App. 105-177) is reported at 839 F. Supp. 1188.

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[1] References to "J.S. App." are to the Appendix to the Jurisdictional Statement on Behalf of the State of Louisiana in No. 95-1681.

JURISDICTION

The judgment of the three-judge district court was entered on January 5, 1996. The United States filed its notice of appeal on February 22, 1996. App., *infra*, 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at J.S. App. 181-184.

STATEMENT

This case, which has previously been before the Court (*United States* v. *Hays*, 115 S. Ct. 2431 (1995)), concerns a challenge to the State of Louisiana's 1994 congressional redistricting plan (Act 1). A three-judge district court held that plan unconstitutional, enjoined the State from using it, and required future elections to be held under a court-ordered plan instead. The United States, a defendant intervenor below, has appealed from that judgment. The State of Louisiana and the other defendant intervenors also have appealed.

1. Louisiana has a population of approximately 4.2 million persons, of whom 30.6% are black. Black persons constitute approximately 27% of the State's voting age population. Louisiana has a long history of discrimination against its black citizens in voting. Louisiana has used a variety of devices to minimize the effective participation of black voters in the political process, including grandfather clauses, literacy tests, white primaries and discriminatory purges. See *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La. 1963), aff'd, 380 U.S. 145 (1965). Louisi-

ana's discrimination in voting has also extended to redistricting. From Reconstruction until the 1980s, black voters were not in a majority in any Louisiana congressional district. In a challenge to the 1981 Louisiana congressional redistricting plan, the court in *Major* v. *Treen*, 574 F. Supp. 325, 335 (E.D. La. 1983), found that the State had fragmented cohesive black neighborhoods in New Orleans that shared "common political and socioeconomic interests," and that the plan diluted minority voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. Following that decision, Louisiana created a majority-black district in New Orleans. That district was the only one of Louisiana's eight districts that was majority black.

As a result of the 1990 Census, Louisiana lost one of its congressional seats. In 1992, the Louisiana legislature adopted a districting plan (Act 42) in which two of its seven congressional districts were majority black. One district was centered in the City of New Orleans and was similar in location and shape to the majority-black district in the prior plan; the second (District 4) connected parts of Shreveport, Monroe, Alexandria, Baton Rouge and Lafayette in a rough "Z" shaped configuration. District 4 was 63% black in voting age population.

Four Louisiana voters challenged Act 42 on equal protection grounds. In December, 1993, a three-judge district court ruled that the plan was unconstitutional. J.S. App. 105-177. The court subjected the plan to strict scrutiny on the ground that the legislature intentionally drew District 4 along racial lines. *Id.* at 126, 145. The court held that the plan failed strict scrutiny because, assuming that the State had a compelling interest in creating two

majority-black districts, the State "pack[ed]" more black voters into District 4 than was "reasonably necessary to give blacks a realistic chance to determine the outcome of elections there," *id.* at 150-151, and a second majority-black district could be drawn that would be "significantly more compact and comport much more closely with other traditional redistricting principles," *id.* at 152-153.

2. The State appealed, but then enacted a redistricting plan (Act 1) with a newly configured District 4. The boundaries of the new district, which is 55% black in voting age population, differ substantially from those of District 4 in Act 42. The evidence shows that state legislators returned to the redistricting process with the intent of addressing the concerns of the three-judge court that had invalidated Act 42. La. Exh. 1 (1994), Sen. Comm. 4/18/94 Tr. 12; Koepp Test., 7/21/94 a.m., Tr. 43-44. Several state senators instructed Glen Koepp, the State's demographer, to use configurations of District 8 from previous congressional redistricting plans as the basis for District 4. Koepp Test., 7/21/94 a.m., Tr. 13. District 8 between 1967 and 1992 usually began in the western part of the State, included areas along the Red and Mississippi Rivers as it moved southeast, and ended beyond Baton Rouge. J.S. App. 195-198. Blacks are geographically concentrated in much of the area covered by the various configurations of old District 8, particularly along the Red and Mississippi Rivers. Koepp Test., 7/21/94 a.m., Tr. 13; Hilliard Test., 7/21/94 p.m., Tr. 66-67. Both the House and Senate committees responsible for redistricting were shown slides comparing old District 8 to proposed District 4, and legislators remarked on similarities between the two throughout the redistricting process. La. Exh. 1

(1994), House Comm. 4/18/94 Tr. 46; Brinkhaus Test., 7/22/94 a.m., Tr. 21; La. Exh. 18 (1994), Jetson Decl. 2; La. Exh. 16 (1994), Accardo Decl. 3. Koepp and the legislators "were trying to look at what was the tradition in Louisiana, what [was] the history of how [the State] did things." Koepp Test., 7/21/94 a.m., Tr. 25; see also *id.* at 20-21, 23.

Senate President Samuel Nunez also instructed Koepp to produce a plan that would protect both Democratic and Republican incumbents, La. Exh. 1 (1994), Sen. Comm. 4/18/94 Tr. 13-14, and the Governor called for a special legislative session on redistricting only after the State's congressional delegation had approved Koepp's plan. Koepp Test., 7/21/94 a.m., Tr. 45-47. Avoiding splits in parishes has never been an absolute imperative in Louisiana. The District 8 in effect between 1973 and 1982, for example, contained four split parishes. U.S. Exh. 3 (1994). Koepp nonetheless "worked very hard" to keep parishes as whole as possible, Koepp Test., 7/21/94 a.m., Tr. 14; La. Exh. 1 (1994), Sen. Comm. 4/18/94 Tr. 27, and District 4 in Act 1 divides half as many parishes as District 4 in Act 42.

Compactness as traditionally recognized in Louisiana was also a factor when Koepp drew his plan. Koepp Test., 7/21/94 a.m., Tr. 29, 67. As Koepp stated: "Of course, you're looking at the screen to see whether or not what you're assigning is compact or is contiguous or not. I was aware of that constantly." Koepp Dep. 46. District 4 in Act 1 is 10 miles longer than the version of District 8 in effect between 1971 and 1972, U.S. Exh. 8 (1994), Hilliard Decl., Table 1. The legislature rejected several versions of District 4 because they were less compact than the adopted version. Koepp Test., 7/21/94 a.m., Tr. 28-29, 67.

Representative Copelin, a chief sponsor of the Act 1 plan in the House, stated in a redistricting hearing that District 4 was meant to reflect "commonality" in areas such as income, health, farming, and transportation, and that race was not the driving force behind the bill. La. Exh. 1 (1994), House Comm. 4/18/94 Tr. 30, 41-44, 72. He noted that District 4 "ha[d] worked historically" and was "basically the same district that Gillis Long had for years." House Comm. 4/18/94 Tr. 46. Similarly, during the House debate, Representative Jetson stressed "the commonality of interests and characteristics shared by all of the persons who resided within proposed congressional district 4." La. Exh. 18 (1994), Jetson Decl. 2; La. Exh. 1 (1994), House Comm. 4/20/94 Tr. 87. In the Committee hearings, he cited "education, income, living below the poverty level, as well as uninsured and under-insured concerns, infant mortality rates, low birth rate, primary care, fair housing practices, environmental concerns and a number of [other] areas." La. Exh. 1 (1994), House Comm. 4/20/94 Tr. 87. Jetson also distributed a handout to the members of the House that explained "how the persons grouped within District 4 under Act No. 1 share similar economic, educational and employment characteristics." La. Exh. 18 (1994), Jetson Decl. 2; La. Exh. 1 (1994), House Comm. 4/20/94 Tr. 87-88; see also La. Exh. 16 (1994), Accardo Decl. 2-3.

Historically, Louisiana was divided into agricultural, industrial, geographic, and cultural regions. Hilliard Test., 7/21/94 p.m., Tr. 30, 33-37. Modern transportation and communication, population migration, and the diversification of agriculture have caused those regions to become less distinct. *Id.* at 30, 33, 56. Any plan dividing Louisiana into seven

districts, each with approximately 603,000 people, must include districts that encompass diverse populations, topography, and traditions. Hilliard Test., 7/21/94 p.m., Tr. 56-57; Koepp Dep. 123; Koepp Test., 7/21/94 a.m., Tr. 9. Act 1 reflects Louisiana's geographic, economic, and cultural regions as well or better than any of the other plans considered by the legislature, including those with only one majority-black district. Hilliard Test., 7/21/94 p.m., Tr. 44-48.

District 4 is unified by its location along the Red River Valley and by its concentration of black population, a legacy of nineteenth century cotton production along the river. Hilliard Test., 7/21/94 p.m., Tr. 66-67. The white residents of District 4 share a common socioeconomic background that distinguishes them from whites in Louisiana's other congressional districts, who generally have a higher socioeconomic standing. Tolbert Test., 10/30/95, Tr. 200-201. Within District 4, blacks and whites are more similar in terms of social class than in any other Louisiana district. U.S. Exh. 1 (1995), Tolbert Report 5-6; Tolbert Test., 10/30/95, Tr. 206-207. The residents of District 4 have views on policy issues that are distinct from residents in other districts, regardless of where in the district they are located. U.S. Exh. 2 (1995), Howell Decl. 7-8.

Voting in Louisiana is racially polarized. Black voters consistently support black candidates, and black voters have been unable to elect those candidates to Congress or to the state legislature unless they have constituted a majority of the registered voters in a district. La. Exh. 13 (1994), Engstrom Decl. 9. Racial polarization in the area covered by District 4 has been particularly severe. In the five most recent primary and run-off elections in old

District 8, an average of 87.5% of blacks supported black candidates, while an average of only 9.3% of whites supported black candidates. La. Exh. 15 (1994), charts 1-2. The state legislature was aware of the reality of racial bloc voting and its effect on the opportunity of black voters in Louisiana to elect a candidate of their choice. It created a second majority-black district in order to comply with the requirements of the Voting Rights Act and to remedy the continuing effects of voting discrimination in Louisiana. Koepp Test., 7/21/94 a.m., Tr. 22-23; Bagneris Test., 7/21/94 p.m., Tr. 106-107, 110; Brinkhaus Test., 7/22/94 a.m., Tr. 34-35; La. Exh. 16 (1994), Accardo Decl. 3.

3. After the adoption of Act 1, this Court vacated the district court's judgment invalidating Act 42 and remanded the case to the district court for further consideration in light of Act 1. *Louisiana* v. *Hays*, 114 S. Ct. 2731 (1994). The plaintiffs then challenged Act 1, and the United States intervened as a defendant.

The district court ruled that Act 1 was unconstitutional. J.S. App. 63-98. The court held, as it had previously, that "[r]ace-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny." *Id.* at 67. The court further held that the State had failed to establish a compelling interest in drawing a second majority-black district. *Id.* at 68-71. The court ordered into effect its own redistricting plan. *Id.* at 71-72. On appeal, this Court vacated the district court's judgment and remanded the case, ruling that the plaintiffs, who all lived outside District 4, lacked standing to bring the action. *United States* v. *Hays*, 115 S. Ct. 2431 (1995).

4. On remand, the district court allowed the plaintiffs to amend their complaint to add plaintiffs who live in District 4. J.S. App. 8. District 4 Congressman Cleo Fields, the Louisiana Legislative Black Caucus, and a group of District 4 residents were allowed to intervene as defendants. *Id.* at 11 n.31.

In October, 1995, a trial was held in which each side was allotted four hours to present its case. J.S. App. 11. The parties also stipulated that the evidence from the prior proceedings would be included in the record. *Ibid.* On January 5, 1996, the district court issued its decision, again holding Act 1 unconstitutional. *Id.* at 1-53.

The court again held that strict scrutiny was required. J.S. App. 13-17. The court concluded that the legislature intentionally disregarded traditional redistricting principles in order to create a second majority-black district, finding that District 4 is "considerably longer than any other district in the state," that it includes "numerous and diverse cultures, each with its unique identity, history, economy, [and] religious preference," and that it "splits twelve of its fifteen parishes, as well as fourteen municipalities, among which are included four of Louisiana's five largest population centers." *Id.* at 14.

The court further found that, when the shape of District 4 is viewed in conjunction with its racial and population densities, "the fact that race was the predominant factor behind Act 1 becomes overwhelmingly clear." J.S. App. 14. The court noted that, every time District 4 splits a parish or a municipality, "it gathers in a disproportionate number of black voters and excludes a disproportionate number of white voters," and that, "even down to the precinct level, the

State considered only race in determining which pockets of voters to pull in and which pockets of voters to push out." *Ibid.*

The court also found that there was "direct evidence" that race "predominated the design of District 4." J.S. App. 15. It found that the State's cartographer admitted that, in creating District 4, "he concentrated virtually exclusively on racial demographics and considered essentially no other factor except the ubiquitous constitutional 'one person-one vote' requirement." *Ibid.* It found that the testimony of "numerous legislators" established that the reason for the cartographer's focus was that "[t]he Legislature was justifiably convinced that the United States Department of Justice would preclear no redistricting plan for Louisiana that failed to include a second majority-minority district." *Ibid.*

The court rejected as "spurious" the State's reliance on the resemblance between the old District 8 and District 4. J.S. App. 16. It found that the State's cartographer had conceded that "the Old Eighth itself was used as a guise for amassing a large percentage of minority voters into one district, not as a means of following traditional district boundaries." *Id.* at 16-17. The court also rejected the State's reliance on the fact that District 4 follows the Red River and includes people with common interests as "post-hoc rationalizations." *Id.* at 16.

Applying strict scrutiny, the court then held that the State had failed to establish a compelling interest in drawing a second majority-black district. J.S. App. 17-20. It concluded that Section 5 did not require the creation of a second majority-black district because a plan with one majority-black district would not have been retrogressive. *Id.* at 18-19. It concluded that

Section 2 did not require a second majority-black district because it found that District 4 did not satisfy the compactness requirement in *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986). J.S. App. 19. It also concluded that a second majority-black district could not be justified as a remedy for prior voting discrimination. *Id.* at 20. Finally, even assuming the existence of a compelling interest, the court concluded that the plan was not narrowly tailored. *Id.* at 21. The court ordered into effect the same plan it had drawn in 1994. *Id.* at 23.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is the first redistricting case to reach this Court in which the challenged plan was drawn by the State in response to a judicial determination that a previous plan violated the constitutional prohibition against insufficiently justified race-based districting. The challenged plan is a constitutional response to that determination. Its districts are consistent with Louisiana's customary districting practices and its two majority-minority districts are necessary to provide equal political opportunity to the State's black citizens. Review of the district court decision is necessary in order to clarify the circumstances under which a State may constitutionally use race as a districting factor in order to ameliorate the effects of severely racially polarized voting that is the product of state voting discrimination.

A. 1. Under *Miller* v. *Johnson*, 115 S. Ct. 2475 (1995), a federal court's review of a State's redistricting plan must begin with a recognition that redistricting "is primarily the duty and responsibility of the State," that States "must have discretion to exercise the political judgment necessary to balance

competing interests," and that there is a "presumption" that the State has exercised that judgment in "good faith." *Id.* at 2488. The presumption of good faith does not disappear simply because a showing is made that the State intended to create a majority-minority district. Rather, to overcome the presumption of good faith that attaches to a State's redistricting plan, a plaintiff must demonstrate that, in creating more majority-minority districts, the legislature "subordinated traditional race-neutral districting principles," *ibid.*, relying on race "in substantial disregard of customary and traditional districting practices," *id.* at 2497 (O'Connor, J., concurring).

Appellees failed to make the required showing in this case. The State admittedly intended to create a second majority-black district. But it did not pursue that goal in substantial disregard of its customary and traditional redistricting practices. On the contrary, the State deliberately modelled District 4 on District 8 in previous congressional redistricting plans, and District 4 resembles various versions of old District 8. District 4 is not an exact replica of old District 8, and it splits more parishes and municipalities than any version of old District 8. But District 4 is sufficiently similar to old District 8 to make it incorrect to conclude that adoption of District 4 disregarded Louisiana's traditional districting practices.

Even apart from its basis in old District 8, District 4 fits comfortably within the State's customary districting practices. As the map of Act 1 illustrates (J.S. App. 194), District 4 is reasonably compact and contiguous. It is generally wide and straight. It follows the Red River and then the Mississippi River,

two important geographic features in the State, and the population that is concentrated along those rivers shares common interests. Because District 4 reflects the State's intent to create a majority-black district while simultaneously preserving its redistricting traditions, it should not have been subjected to strict scrutiny under *Johnson*.

This case is similar to *DeWitt* v. *Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), aff'd in part, appeal dismissed in part, 115 S. Ct. 2637 (1995). In *DeWitt*, the special masters responsible for drawing California's congressional and legislative plans explicitly set out to draw majority-minority districts where there were geographically concentrated minority populations. *Id.* at 1411, citing *Wilson* v. *Eu*, 823 P.2d 545, 549 (Cal. 1992). As detailed in the special masters' report, 823 P.2d at 560, 582-596, in order to create majority-minority districts, it was sometimes necessary to split counties and municipalities. The special masters' plans were challenged in federal district court on the ground that they constituted unconstitutional racial gerrymanders. A three-judge district court rejected that claim. The court held that strict scrutiny of those plans was not warranted because the special masters had engaged in "a judicious and proper balancing of the many factors appropriate to redistricting, one of which was the consideration of the application of the Voting Rights Act's objective of assuring that minority voters are not denied the chance to effectively influence the political process." 856 F. Supp. at 1413-1414. That reasoning is equally applicable here.

2. a. The district court's invocation of strict scrutiny was based in part on its view that District 4 violates traditional redistricting principles, such as

compactness, preserving communities of interest, and preserving political subdivisions. J.S. App. 13-14. The district court, however, failed to assess those considerations in the context of *Louisiana*'s particular districting practices. See *ibid.* Under *Johnson*, strict scrutiny is not triggered simply because a State fails to follow redistricting practices that are generally followed elsewhere. Strict scrutiny is required only when the State relies on race in substantial disregard of its own "customary and traditional redistricting practices." *Johnson*, 115 S. Ct. at 2497 (O'Connor, J., concurring). The similarity of the configuration of District 4 to old District 8, on which it was based, and the evidence that District 4 was designed to combine persons with common interests, as is customary in Louisiana, make strict scrutiny inappropriate here.

b. The district court's use of strict scrutiny was also based on testimony from "numerous legislators" that they believed that a second majority-black district was necessary to comply with the Voting Rights Act. J.S. App. 15. A desire to comply with the Voting Rights Act, however, is not the equivalent of an intent to subordinate traditional redistricting considerations to racial ones. All of the legislators supporting District 4 who testified stated that they supported District 4 only because it did *not* substantially depart from the State's traditional districting practices. Bagneris Test., 7/21/94 p.m., Tr. 104, 106, 113-114, 119-120; Brinkhaus Test., 7/22/94 a.m., Tr. 13, 17; La. Exh. 16 (1994), Accardo Decl. 2; La. Exh. 18 (1994), Jetson Decl. 2.

In light of that evidence, the district court's conclusion (J.S. App. 12 & n.33) that *Johnson* is "factually on all fours" with this case is incorrect. In

Johnson, the Georgia legislature created a third majority-black district in order to obtain Section 5 preclearance from the Attorney General, even though the State had concluded that such a district would violate its established redistricting standards. 115 S. Ct. at 2489-2490. The Louisiana legislature in this case concluded, however, that it was possible to comply with the Voting Rights Act *without* substantially disregarding its traditional redistricting standards. The district court's reliance on *Johnson* is therefore incorrect.

c. The district court also placed significant reliance on the testimony of the State's demographer, Glen Koepp. The court found that Koepp admitted that he focused almost exclusively on race in drawing District 4. J.S. App. 15. The court also found that Koepp admitted that he used old District 8 as a guise for creating a majority-black district and not because it reflected the State's traditional districting practices. *Id.* at 16-17. Those findings incorrectly describe Koepp's testimony. Koepp testified that his goal was to draw a majority-black district *only if that could be done in a way that was consistent with the State's traditional redistricting practices*, and that District 8 was used as the model for District 4 because it showed the most promise for fulfilling that goal. Koepp Test., 7/21/94 a.m., Tr. 31-34; Koepp Dep. 71-72, 110-112, 147-148. The district court therefore clearly erred in treating Koepp's testimony as evidence that traditional redistricting practices were disregarded in the drawing of District 4.

d. The district court characterized evidence that the residents in District 4 share common interests as post-hoc rationalizations, not considered by the legislature. J.S. App. 16. The record unequivocally

establishes, however, that the legislators did consider the shared interests of persons in District 4 during the legislative debate on Act 1. The district court's conclusion incorrectly disregards the "presumption of good faith" that attaches to state legislative action.

B. 1. The district court also erred in holding that Act 1 does not satisfy strict scrutiny. For reasons set forth at length in our brief in *Bush* v. *Vera* at 19-23, Nos. 94-805, 94-806, and 94-988, a State has a compelling interest in complying with Section 2 of the Voting Rights Act. That compelling interest is implicated here. The record shows that voting in Louisiana is extraordinarily polarized along racial lines. The district court recognized that racial bloc voting is "a fact of contemporary Louisiana politics." J.S. App. 6 n.17; see *id.* at 20 n.61. Black voters consistently support black candidates, but unless blacks have constituted a majority in a district, those candidates have always been defeated by whites voting as a bloc. The record also shows that blacks concentrated along the Red and Mississippi Rivers could constitute a majority in a district that is within the range of the compactness of districts the State has used before. In deciding whether the *Gingles* compactness requirement has been satisfied, the most relevant inquiry is whether the proposed majority-minority district is "reasonably compact" in light of the way the State traditionally draws districts. *Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 498 U.S. 1019 (1991); *Houston* v. *Lafayette County*, 56 F.3d 606 (5th Cir. 1995); *Clark* v. *Calhoun County*, 21 F.3d 92, 95-96 & n.2 (5th Cir. 1994); *Cane* v. *Worcester County*, 35 F.3d 921, 926 n.6 (4th Cir. 1994). District 4 is only ten miles longer than the version of old District 8 in effect between

1971 and 1972, and is similar in shape to several versions of old District 8. The State therefore had "a strong basis in evidence," *Johnson*, 115 S. Ct. at 2491, for concluding that a plan without a second majority-black district would violate Section 2. See *Gingles*, 478 U.S. at 48-51 (preconditions for a Section 2 violation are minority political cohesion, white bloc voting that results in the usual defeat of minority-preferred candidates, and the possibility of creating a reasonably compact district).[2]

2. This Court's decisions make clear that, even absent a federal statutory duty, a State has an independent compelling interest in taking race-conscious action to remedy identified discrimination within its jurisdiction. *Adarand Constructors, Inc.* v. *Pena*, 115 S. Ct. 2097, 2117 (1995); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 491-493, 509 (1989) (opinion of O'Connor, J.). Louisiana in this case had a compelling interest in ameliorating the effects of racial bloc voting attributable to past and present governmental and private discrimination. As Justices White, Stevens, and Rehnquist observed in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 167 (1977) (opinion of White, J.), a State is not "powerless to minimize the conse-

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[2] The same conclusion would be reached if the State were required to show an "actual violation," rather than "a strong basis in evidence." The *Gingles* preconditions were established and the totality of circumstances shows that a plan with only one majority-black district would have resulted in denying black voters an equal opportunity to participate in the political process and to elect representatives of their choice. For that reason, the district court's remedial plan, which contains only one majority-black district, violates Section 2.

quences of racial discrimination by voters when it is regularly practiced at the polls."

The district court acknowledged both "the gravity of Louisiana's well-documented history of racial discrimination with regard to its voting policies," J.S. App. 20, and the present-day racial polarization in voting attributable to that history, *id.* at 6 n.17, 20 n.61. It nonetheless concluded that the State did not have a compelling interest in eliminating the consequences of that past governmental discrimination. *Id.* at 20. That holding was erroneous.[3]

3. Without analysis, the district court held that, even assuming the State had a compelling interest in drawing a second majority-black district, District 4 was not narrowly tailored to further that interest. J.S. App. 21. That holding is incorrect.

Blacks constitute 30.6% of Louisiana's population and 27.7% of the voting age population, and Act 1 contains two majority-black districts out a total of seven (28.5%). Act 1 therefore creates no more majority-black districts than are justified by the State's compelling interests in complying with the Voting Rights Act and in remedying racial discrimination by and within Louisiana. Nor does Act 1 suffer from the defect of unnecessary packing. District 4 has a black voting age population of 54.7%, close to the minimum percentage necessary to pro-

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[3] The district court's finding (J.S. App. 20) that the Louisiana legislature did not consider the effects of the State's history of discrimination when it adopted Act 1 is clearly erroneous. The evidence clearly shows that the enactment of Act 1 was motivated in part by the legislature's desire to overcome the effects of racial bloc voting and the history of exclusion of Louisiana's black residents from the political process. See p. 8, *supra*.

vide black voters with a reasonable opportunity to elect candidates of their choice. Finally, the State could not have drawn a second majority-black district that was more consistent with its traditional districting values than District 4. Act 1 is therefore narrowly tailored to further the State's compelling interests in complying with the Voting Rights Act and ameliorating the effects of polarized voting attributable to past and present racial discrimination.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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PAUL BENDER
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Attorneys

APRIL 1996

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

Civil Action No. CV 92-1522S, 95-1241

RAY HAYS, EDWARD L. ADAMS, SUSAN SHAW SINGLETON, GARY STOKLEY, PATRICIA SLOCUM, RICHARD DAVID, BARBARA DAVID, TERRY GILLESPIE, FLOYD GONZALEZ, RICHARD SANDERS, PARKS SANSING AND BOBBY WILLIAMS, PLAINTIFFS

v.

STATE OF LOUISIANA; M. J. "MIKE" FOSTER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA; RANDALL EWING, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE LOUISIANA STATE SENATE; HUNT DOWNER, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE FOR THE STATE OF LOUISIANA; W. FOX MCKEITHEN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF LOUISIANA; JERRY FOWLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF ELECTIONS FOR THE STATE OF LOUISIANA; AND CERTAIN UNIDENTIFIED STATE LEGISLATORS, DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-INTERVENOR,

CLEO FIELDS, LOUISIANA LEGISLATIVE BLACK CAUCUS BERNADINE ST. CYR, PATRICK FONTENOT HAZEL FREEMAN, RALPH WILSON, DEFENDANT-INTERVENORS.

[Filed Feb. 22, 1996]

NOTICE OF APPEAL

Notice is hereby given that the defendart-intervenor, United States, hereby appeals to the United States Supreme Court from the Judgment of the United

States District Court, Western District of Louisiana (three-judge court), entered on January 5, 1996.

This appeal is taken pursuant to 28 U.S.C. 1253.

Respectfully submitted,

MICHAEL D. SKINNER
United States Attorney

DEVAL L. PATRICK
Assistant Attorney General

/s/ RICHARD JEROME
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TO COA-SC;
Judge Walter, Wiener & Shaw;
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Flanagan; Kahe; Koepp;
McCallum; Zeatner; Hurd;
Gasaway; Nelson; Quigley;
McDuff; Higginbotham; Jones;
Hebert; Pugh; Richmond; Warren,
Olsen, Dangerfield; Barrien;
Edwards; Davenport; Dowan;
Wright